No. 981441 MAR 4 - 1999

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is "dictated by precedent" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of such a request by the defendant, particularly where the defendant has been advised of his appeal rights.

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IN THE SUPREME COURT OF THE UNITED STATES
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ERNEST C. ROE, WARDEN, *Petitioner*,

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OPINION BELOW[1]

Petitioner respectfully petitions for a writ of certiorari to review the November 2, 1998, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998) (No. 97-17232) (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California that denied Respondent's habeas corpus petition. Respondent is a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of the State of California.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Ortega v. Roe*, 160 F.3d 534; (B) the Ninth Circuit's unpublished Denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed December 11, 1998 (No. 97-17232); (C) the text of pertinent constitutional provisions, statutes, and court rules, namely:

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

(1) the Sixth Amendment to the United States Constitution; (2) California Penal Code § 1237.5; (3) California Penal Code § 1240.1; (4) California Rules of Court, Rule 31(d); (5) California Rules of Court, Rule 470.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, Petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on November 2, 1998. On December 11, 1998, the Ninth Circuit denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED IN THIS CASE

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix C. These authorities include: the Sixth Amendment to the United States Constitution; California Penal Code § 1237.5; California Penal Code § 1240.1; California Rules of Court, Rule 31(d); and California Rules of Court, Rule 470.

STATEMENT OF THE CASE

An information was filed in the Superior Court of California, in and for the County of Fresno ("superior court"), in case number 490730-9, charging Respondent Lucio Flores Ortega as follows: in count one, with

violating California Penal Code § 187 (murder);[2] and in counts two and three with violating § 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of § 12022(b) (an enhancement for the personal use of a deadly weapon).

On October 13, 1993, Respondent pled guilty to the murder count. On November 10, 1993, the superior court granted the prosecution's motion to dismiss counts two and three (assault with a deadly weapon) and to strike the § 12022(b) allegation of personal use of a deadly weapon.

On the same date, the superior court sentenced Respondent to fifteen years to life in state prison, with 267 days of custody credit. The superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit on or about February 20, 1998, at 10-11.) Nevertheless, Respondent did not file a timely notice of appeal.[3]

On March 24, 1994, Respondent attempted to file a late notice of appeal. On April 8, 1994, the clerk of the superior court informed Respondent that his notice was not filed because it was untimely. On August 12, 1994, the California Court of Appeal, Fifth Appellate

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2. All further statutory references are to the California Penal Code unless otherwise indicated.

This is not a capital case.

3. On January 9, 1994, Respondent's conviction became "final" within the meaning of *Teague*. "Finality" is the denial of a petition for certiorari or expiration of time within which to petition for certiorari. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987). In this case, Respondent was sentenced on November 10, 1993, and had sixty days in which to file a notice of appeal which was not filed. The time to file a petition for writ of certiorari expired at that time. Respondent's conviction therefore became final on January 9, 1994. *See* Cal. Rules of Court, Rule 31(a). (This Rule of Court is not included in Appendix C because of its marginal relevance to the questions presented.)

District, denied Respondent's petition for writ of habeas corpus which included a motion for leave to file a belated notice of appeal. On January 18, 1995, the California Supreme Court denied Respondent's habeas corpus petition filed therein, which requested the same relief.

On July 27, 1995, pursuant to 28 U.S.C. § 2254, Respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, and Petitioner answered on November 17, 1995. The District Court's jurisdiction was conferred by 28 U.S.C. § 2254.

In his federal habeas petition, Respondent claimed that his state trial counsel (Ms. Nancy Kops) promised to file a notice of appeal on his behalf and failed to do so. Following appointment of the Federal Defender as Respondent's counsel, an evidentiary hearing was held on January 24, 1997, to address the sole issue of the credibility of this assertion.

On April 3, 1997, the Magistrate Judge filed his Findings and Recommendations ("F&Rs"), recommending denial of the petition. Respondent filed objections and Petitioner replied. On June 30, 1997, the District Court adopted the F&Rs, and denied the petition. In so doing, the District Court found that Respondent had not met his burden of showing that trial counsel promised to file a notice of appeal. The District Court also determined that Respondent was not entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), which requires a defendant's consent before counsel may abandon a potential appeal, because *Stearns* is a "new rule" barred by *Teague*.

On July 16, 1997, Respondent filed a timely notice of appeal in the Ninth Circuit. A certificate of probable cause was issued. The parties filed appellate briefs. The Ninth Circuit's jurisdiction was conferred by 28 U.S.C. § 2253.

In a published opinion, *Ortega*, 160 F.3d 534, filed November 2, 1998, the Ninth Circuit reversed and remanded. The Ninth Circuit held that *Stearns* did not state a "new rule," rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). In *Lozada*, the Ninth Circuit held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668 (1984), if it is established that counsel's failure to file a notice of appeal was without the defendant's consent. The Ninth Circuit's *Ortega* decision instructed the District Court to issue a conditional writ releasing Respondent from state custody unless the state trial court vacated and reentered Respondent's judgment of conviction and allowed a fresh appeal. (Appendix A.) The Ninth Circuit's judgment was entered on this date.[4]

On November 16, 1998, Petitioner filed a timely Petition for Rehearing With Suggestion for Rehearing En Banc. On December 11, 1998, the Ninth Circuit denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. (Appendix B.)

On January 14, 1999, the Ninth Circuit denied Petitioner's Motion for Stay of Issuance of Mandate for time to file a petition to the United States Supreme Court for writ of certiorari.[5]

On February 5, 1999, Petitioner filed an application to stay the Ninth Circuit's mandate directed to Circuit Justice Sandra Day O'Connor. (A-648.) On February 16, 1999, this application was denied.

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4. In at least one case, the Ninth Circuit has granted relief based on *Stearns* and *Ortega*. *Salmon v. Carrillo*, No. 96-55707 (9th Cir. Nov. 13, 1998) [1998 WL 792290] [unpublished disposition].

5. The January 14, 1999, order erroneously refers to "[a]ppellant's" motion for stay of mandate. In fact, the motion of Petitioner, Respondent-Appellee in the Ninth Circuit, was the subject of the order.

Petitioner intends to renew his stay application in this Court. If necessary, Petitioner will file a stay application in the state trial court and/or the California Court of Appeal, Fifth Appellate District. (Opposition to Application to Stay Mandate of United States Court of Appeals for the Ninth Circuit Pending Certiorari at 5 [Petitioner may seek state appellate court stay].)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons: First, the Ninth Circuit's *Ortega* opinion conflicts with United States Supreme Court authority, other federal circuit authority, and state supreme court authority on the issue of whether United States Supreme Court authority, as opposed to federal circuit court authority, determines whether a rule is "dictated by precedent" within the meaning of *Teague*.[6] Second, *Ortega* conflicts with other federal circuit court authority and California law on the issue of whether trial counsel is required to file a notice of appeal following a guilty plea in the absence of such a request by the defendant.[7]

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following,

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6. Petitioner acknowledges that federal circuit court authority may show that a rule is *not* dictated by precedent within the meaning of *Teague*. The Ninth Circuit has correctly indicated that a rule is not dictated by precedent where reasonable courts might disagree about its application. *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-25 (9th Cir. 1991); *see also Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995). The Eleventh Circuit is in accord. *Glock v. Singletary*, 65 F.3d 878, 885 (11th Cir. 1995) (en banc). Indeed, the United States Supreme Court has recently said that unless a result is apparent to all reasonable jurists, i.e., no other interpretation is reasonable, the result is not dictated by precedent. *Lambrix v. Singletary*, 520 U.S. 518, ___, 117 S.Ct. 1517, 1530, 137 L.Ed.2d 771 (1997).

7. As noted, the superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit, on or about February 20, 1998, at 10-11.)

although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; . . .
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

. . . .

In the present case, certiorari should be granted for the two reasons noted above: First, *Ortega* conflicts with United States Supreme Court authority, other federal circuit authority, and state supreme court authority on the issue of whether United States Supreme Court precedent, as opposed to federal circuit court precedent, determines whether a rule is "dictated by precedent" within the meaning of *Teague*. As noted, *Ortega* relied on a prior Ninth Circuit decision (*Lozada*) in determining that *Stearns* was not *Teague*-barred. However, as shown below, United States Supreme Court authority, other federal circuit court authority, and state supreme court authority

all indicate that it is United States Supreme Court precedent *alone* which determines whether a rule is "dictated by precedent" per *Teague*. Thus, *Ortega* conflicts with United States Supreme Court authority (Rule 10(c)), other federal circuit court authority (Rule 10(a)), and state supreme court authority (Rule 10(a)). Clearly, this is an important federal question. Rule 10(a), (c).

Second, certiorari should be granted because *Ortega* conflicts with other federal circuit court authority and California law on the issue of whether trial counsel is required to file a notice of appeal following a guilty plea in the absence of a request by the defendant. *Ortega* follows *Stearns*, which held that it is ineffective assistance if it is established that counsel's failure to file a notice of appeal after a guilty plea was without the defendant's consent. Other federal circuits have stated that counsel has no constitutional duty to file a notice of appeal in the absence of a request by the defendant. Likewise, California law does not require the filing of a notice of appeal unless (1) there are arguably meritorious grounds, or (2) the defendant so requests. Thus, *Ortega* conflicts with other federal circuit authority (Rule 10(a)) and California law (*cf.* Rule 10(a) [conflict with state supreme court]). Obviously, the issue of whether trial counsel is constitutionally required to file a notice of appeal after a plea, without a request, is an important federal question. Rule 10(a). These arguments are presented in greater detail below.

ARGUMENT

I.

THE NINTH CIRCUIT'S *ORTEGA* DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT, OTHER FEDERAL CIRCUIT PRECEDENT, AND STATE SUPREME COURT PRECEDENT: IT IS UNITED STATES SUPREME COURT PRECEDENT, NOT CIRCUIT COURT PRECEDENT, WHICH DETERMINES WHETHER A RULE IS DICTATED BY PRECEDENT WITHIN THE MEANING OF *TEAGUE*

Ortega conflicts with United States Supreme Court precedent, other federal circuit precedent, and state supreme court authority. These authorities indicate that it is United States Supreme Court authority, not circuit court authority, which determines whether a rule is dictated by precedent within the meaning of *Teague*. *Ortega* erroneously relied on Ninth Circuit precedent in determining that a rule was not *Teague*-barred. *Ortega* held that *Stearns*, 68 F.3d 328, was not a new rule; rather, it was an application of the rule in *Lozada*, 964 F.2d 956. As shown below, United States Supreme Court authority, other federal circuit authority, and state supreme court authority indicate that it is United States Supreme Court precedent, not circuit court precedent, that determines whether a rule is dictated by precedent within *Teague*'s

meaning.[8] Because *Ortega* conflicts with this authority, certiorari should be granted.

A. United States Supreme Court Authority Indicates That It Is United States Supreme Court Authority That Controls For *Teague* Purposes

United States Supreme Court authority indicates that it is United States Supreme Court precedent which determines whether a rule is dictated by precedent within *Teague*'s meaning. *Teague* itself supports this. In *Teague* the Supreme Court stated that a new rule is one which breaks new ground or imposes a new obligation on the states or Federal Government. The Supreme Court cited examples of such rules; both were United States Supreme Court decisions. *Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.), citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); and *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). *See also Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.), citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting) (stating that *Skipper v. South Carolina*, 476 U.S. 1 (1986), is a new rule). *See also Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.): applying fair cross section requirement to petit juries would be a new rule, citing *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Akins v. Texas*, 325 U.S. 398, 403 (1945).

Moreover, the *Teague* court gave additional authority affirming that it is United States Supreme Court

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8. Respondent may attempt to argue that *Lozada* was merely applying United States Supreme Court precedent. However, in stating that prejudice would be presumed where counsel's failure to file was without the defendant's *consent* (as opposed to a failure to file despite the defendant's request), *Lozada* cited no United States Supreme Court authority, or authority of any kind. *Lozada*, 964 F.2d at 958.

precedent which determines whether a rule is dictated by precedent. The *Teague* court cited a prior concurring opinion by Justice Jackson (*Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., concurring in the result)) for the proposition that state courts cannot anticipate "this Court's" due process requirements, i.e., the Supreme Court's due process requirements. *Teague*, 489 U.S. at 310 (plurality opinion by O'Connor, J.). Thus, the *Teague* court itself indicated that it is United States Supreme Court authority which determines whether a rule is dictated by precedent per *Teague*.

A passage from the comparatively recent case of *Lambrix*, 520 U.S. 518, ___, 117 S.Ct. 1517, 137 L.Ed.2d 771, also supports this view. In the pertinent passage, the majority opinion responds to the dissenting opinion's view that *Espinosa v. Florida*, 505 U.S. 1079 (1992) (which concerns capital sentencing) was a reasonable interpretation of the law. The *Lambrix* court states that the *Teague* inquiry is applied to "Supreme Court decisions[.]" *Lambrix*, 117 S.Ct. at 1530. Thus, the *Lambrix* court clearly established that the *Teague* inquiry is one based on United States Supreme Court precedent.

Additional United States Supreme Court authority supports this principle. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the Ninth Circuit stated in dicta that "[d]espite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view." *Id.* at 736. However, in vacating the Ninth Circuit's later decision in that case, the Supreme Court characterized the circuit court's discussion of the binding effect of lower federal court decisions on state courts as "remarkable." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1064 n.11 . . . (1997) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 . . . (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow

rulings of federal courts of appeals on questions of federal law)); *see also Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) and cases cited therein. Thus, the United States Supreme Court has recently made its view clear: lower federal court authority is not binding on the state courts. Consequently, federal circuit court authority also cannot be controlling precedent for *Teague* purposes. *Ortega* conflicts with United States Supreme Court authority on this point; thus, certiorari should be granted.

Individual Supreme Court justices have expressed the view that state courts are bound only by United States Supreme Court authority. *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., joined by White and Marshall, JJ., concurring and dissenting).

Thus, United States Supreme Court authority indicates that it is United States Supreme Court authority that controls for *Teague* purposes.

B. Federal Circuit Court Authority Indicates That United States Supreme Court Authority Controls For *Teague* Purposes

Further, *Ortega* conflicts with federal appellate court decisions which conclude that state courts are bound only by United States Supreme Court authority. *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), and cases cited therein;[9] *Owsley v.*

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9. *United States ex rel. Lawrence v. Woods* was criticized by *Netzel v. United Parcel Service*, 165 Ill.App.3d 685, 692-95, 520 N.E.2d 665, 669-71, 117 Ill.Dec. 314, 318-20 (Ill.App.Ct. 1987). However, this criticism was based on a distinction between matters of federal constitutional law and matters of federal statutory interpretation which is not pertinent here. 165 Ill.App.3d at 692-93, 520 N.E.2d at

Peyton, 352 F.2d 804, 805 (4th Cir. 1965). Because these decisions conclude that state courts are bound only by United States Supreme Court precedent, they support the proposition that only United States Supreme Court precedent can be controlling for *Teague* purposes. Therefore, *Ortega* conflicts with them.

Two more recent federal circuit decisions support Petitioner's position that lower federal court authority is not binding on the states: *Clemmons v. Delo*, 124 F.3d 944, 955 n.11 (8th Cir. 1997) (assuming, without deciding, that "firmly dictated by precedent" refers to United States Supreme Court precedent), and *Glock v. Singletary*, 65 F.3d at 885 (federal appellate courts do not dictate rules to state courts for *Teague* purposes). *But see Jiminez v. Myers*, 40 F.3d 976, 979-81 (9th Cir. 1994).[10]

670, 117 Ill.Dec. at 319. The present case involves a matter of federal constitutional law. Even *Netzel* seems to acknowledge that lower federal court decisions are not binding on state courts as to matters of constitutional law, at least where there is a conflict between circuits. 165 Ill.App.3d at 692, 520 N.E.2d at 670, 117 Ill.Dec. at 319. Further, the *Netzel* decision was later reversed by the Illinois Supreme Court in a "supervisory order[.]" *Netzel v. United Parcel Service*, 181 Ill.App.3d 808, 811, 537 N.E.2d 1348, 1349, 130 Ill.Dec. 879, 880 (Ill.App.Ct. 1989). Finally, the Illinois Supreme Court seems to have adopted the view that Illinois courts are not bound by lower federal courts, at least where there is a split between the circuits. *People v. Bean*, 137 Ill.2d 65, 114, 560 N.E.2d 258, 280, 147 Ill.Dec. 891, 913 (Ill. 1990), citing *People v. Stansberry*, 47 Ill.2d 541, 545, 268 N.E.2d 431, 433 (Ill. 1971). *Stansberry* was overruled on other grounds in *People v. Laws*, 84 Ill.2d 493, 497-98, 504, 419 N.E.2d 1150, 1152-53, 1155-56, 50 Ill.Dec. 701, 703-04, 706-07 (Ill. 1981).

10. Petitioner acknowledges that some other recent circuit court authority appears contrary to his position. *See O'Brien v. Dubois*, 145 F.3d 16, 23-24 (1st Cir. 1998), citing *Ciak v. United States*, 59 F.3d 296, 302-03 (2d Cir. 1995). However, upon closer examination, *Ciak* is not contrary to Petitioner's position. The *Ciak* court addressed whether *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994), stated a new rule. In concluding that *Levy* did not state a new rule, the *Ciak* court noted that *Levy* relied on, inter alia, United States Supreme Court precedent. 59 F.3d at 303. Thus, *Ciak* does not support the proposition that circuit court authority can be controlling for *Teague* purposes. Moreover, for the reasons stated in this petition, Petitioner submits that circuit precedent cannot establish a rule for *Teague* purposes. Further, this is especially true where, as here, there is a split of authority in the circuit courts.

C. State Court Authority Indicates That United States Supreme Court Precedent Controls For *Teague* Purposes

Many state courts, including courts of last resort, have reached the conclusion that lower federal court authority is not binding on the states. The following listing is illustrative, but not comprehensive: *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So.2d 905, 913 (Ala. 1995) (stating that prior decision[11] was not binding on whether Eleventh Circuit authority is binding on state; correct rule: state supreme court may rely on decision of any federal court, but is bound by United States Supreme Court); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So.2d 367, 373, n.1 (Ala. 1993); *People v. Avena*, 13 Cal.4th 394, 431, 916 P.2d 1000, 1022, 53 Cal.Rptr.2d 301, 323 (Cal. 1996);[12] *Blue Cross of California v. Superior*

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11. *Ex parte Gurganus*, 603 So.2d 903, 906 (Ala. 1992) (federal decisional law, interpreting a federal statute, is binding on Alabama Supreme Court).

12. *But see People v. Bradley*, 1 Cal.3d 80, 86, 460 P.2d 129, 132, 81 Cal.Rptr. 457, 460 (Cal. 1969) (lower federal court decisions are persuasive and entitled to great

Court, 67 Cal.App.4th 42, 56, 78 Cal.Rptr.2d 779, 788 (Cal.Ct.App. 1998), petition for review denied January 13, 1999 (California Court of Appeal not bound by lower federal court decisions construing Federal Arbitration Act); *Tully v. World Savings & Loan Assn.*, 56 Cal.App.4th 654, 663, 65 Cal.Rptr.2d 545, 550 (Cal.Ct.App. 1997); *Conner v. State*, 251 Ga. 113, 118, 303 S.E.2d 266, 273 (Ga. 1983); *Bean*, 137 Ill.2d at 114, 560 N.E.2d at 280, 147 Ill.Dec. at 913 (citing prior Illinois Supreme Court case: Illinois courts not bound by lower federal courts);[12] *Greene v. State*, 11 Md.App. 106, 110, 273 A.2d 830, 833 (Md.Ct.Spec.App. 1971); *Planned Parenthood of New York City, Inc. v. State, Dept. of Institutions and Agencies*, 75 N.J. 49, 53, 379 A.2d 841, 842-43 (N.J. 1977) (New Jersey Supreme Court not bound by lower federal court decision invalidating state abortion statute); *State v. Glover*, 60 Ohio App.2d 283, 287, 396 N.E.2d 1064, 1067 (Ohio Ct.App. 1978); *Cook v. Lilly*, 158 W.Va. 99, 101, 208 S.E.2d 784, 786 (W.Va. 1974); *State v. Webster*, 114 Wis.2d 418, 426 n.4, 338 N.W.2d 474, 478 n.4 (Wis. 1983). *But see Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (Ala. 1935) (circuit court's construction of federal statute held to be binding); *St. Cloud v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994) (state courts are bound by federal decisions interpreting federal statute; citing cases); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725, 727 (Utah 1918).

Thus, substantial authority supports the conclusion that state courts are not bound by lower federal courts. If state courts are not bound by lower

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weight).

13. At the time of the prior Illinois Supreme Court case, *Stansberry*, 47 Ill.2d at 545, 268 N.E.2d at 433, there was a split between the federal circuits on the matter at issue.

federal court authority, then lower federal court authority cannot be controlling precedent for *Teague* purposes. United States Supreme Court authority, federal circuit court authority, and state supreme court authority all indicate that state courts cannot be bound by lower federal courts. As noted, *Teague*, 489 U.S. at 301, 310 (plurality opinion by O'Connor, J.), and *Lambrix*, 117 S.Ct. at 1530, also contain additional language indicating that only United States Supreme Court authority is controlling under *Teague*. *Ortega* conflicts with this authority. Consequently, certiorari should be granted.

II.

THERE IS A SPLIT OF FEDERAL CIRCUIT AUTHORITY ON THE ISSUE OF WHEN DEFENSE COUNSEL MUST FILE A NOTICE OF APPEAL FOLLOWING A GUILTY PLEA; THE NINTH CIRCUIT'S *ORTEGA* DECISION ALSO CONFLICTS WITH CALIFORNIA LAW ON THIS MATTER

There is a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea. The Ninth Circuit's *Ortega* decision also conflicts with California law on this matter. Consequently, certiorari should be granted.

A. There Is A Split Of Federal Circuit Court Authority As To When Defense Counsel Must File A Notice Of Appeal Following A Guilty Plea

In the present case, there is a split of circuit court authority on the issue of when defense counsel has a duty to file a notice of appeal following a guilty plea. In *Stearns*, 68 F.3d at 330, the Ninth Circuit held that even in a guilty plea case, a *federal* prisoner may obtain habeas relief merely by showing that he did not consent to counsel's failure to file a notice of appeal. Other circuit courts have stated that the defendant must ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue[]"); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557

(10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). As the Sixth Circuit recently stated:

> We emphasize, of course, that a defendant's actual "request" is still a critical element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request. [Citations omitted.]

Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998).

Additional recent circuit court opinions have disagreed with *Stearns*. *Morales v. United States*, 143 F.3d 94, 96-97 (2d Cir. 1998) (agreeing with *Castellanos*); *Fernandez v. United States*, 146 F.3d 148, 148-49 (2d Cir. 1998) (following *Morales*). The Fifth Circuit has also followed *Castellanos*. *United States v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996).[14]

Thus, many circuits have adopted a rule different from *Stearns*. This rule is supported by federal circuit court authority stating that, at least as of January 1994 (when Respondent's case became final), there was not even a recognized federal constitutional duty to advise defendants of their appeal rights after a guilty plea. *See, e.g., Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (federal defendants); *see also Belford v. United States*, 975 F.2d 310, 314-15 (7th Cir. 1992) (citing cases), overruled on other grounds in *Castellanos*, 26 F.3d at 720 (defendant need not show prejudice from failing to file an appeal); *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992) (exceptions for answering inquiry and constitutional issues); *see also United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989) (after guilty plea, no grounds

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14. *Guerra* did not address *Stearns*.

for direct federal appeal except sentence), abrogated on different grounds in *Lozada*, 964 F.2d at 957.[15] Instead, a federal habeas petitioner would have to show that he/she requested his/her attorney to file a notice of appeal and the attorney failed to do so. Indeed, as noted, other circuit courts had stated that a defendant had to ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos*, 26 F.3d at 719.

Moreover, although their holdings were not so limited, *Ludwig*, *Fernandez*, *Morales*, *Guerra*, *Castellanos* and *Peak* involved defendants who pleaded guilty as did Respondent here. *Ludwig*, 162 F.3d at 457; *Fernandez*, 146 F.3d at 148; *Morales*, 143 F.3d at 94, 95; *Guerra*, 94 F.3d at 991; *Castellanos*, 26 F.3d at 718; *Peak*, 992 F.2d at 40.

The above-described split of authority between the Ninth Circuit panels in *Stearns* and the present case and other circuits (as represented by *Castellanos*, *Peak*, *Davis*, *Abels*, *Ludwig*, *Morales*, *Fernandez*, and *Guerra*) means that certiorari should be granted. Clearly, the rule as to when defense counsel must file a notice of appeal following a guilty plea is an important matter. Rule 10(a).

B. *Ortega* Also Conflicts With California Law

The Ninth Circuit's *Ortega* decision also conflicts with California law. California's legal landscape (at least as of January 1994) would not have required the filing of a notice of appeal. For example, a sentencing court was not required to advise a defendant of his/her appeal rights following a guilty plea. Cal. Rules of Court, Rule 470

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15. Apparently, counsel still have no constitutional duty to advise federal defendants of their appellate rights. *Ludwig*, 162 F.3d at 459; *Morales*, 143 F.3d at 97 (quoting *Castellanos*, 26 F.3d at 719, with approval).

(this rule is still in effect); *see also People v. Serrano*, 33 Cal.App.3d 331, 337-38, 109 Cal.Rtpr. 30, 33-34 (Cal.Ct.App. 1973) (no duty by trial court to advise defendant of right to appeal after guilty plea). However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." § 1240.1(a).

Under § 1240.1, defense counsel is required to file a notice of appeal only if there are arguably meritorious appellate issues or the defendant directs that an appeal be filed. § 1240.1(b). These statutory provisions are still in effect.

Petitioner submits that there do not appear to have been any arguably meritorious appellate issues. In the present case, Ms. Kops was representing Respondent, an indigent, who entered a guilty plea to second degree murder. Ms. Kops testified that in her opinion the only grounds for appealing the sentence would have been that the sentencing court abused its discretion in denying probation, and such a claim would almost certainly fail. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 43-44.) It does not appear that there would have been any grounds for attacking the validity of the plea on appeal. (Excerpts of Record, filed in the Ninth Circuit on or about February 20, 1998, at 89-107 [entry of plea].) Ms. Kops also testified that even if she had not encouraged a client to file a notice of appeal, if a client had asked her to do so, she would have filed a notice. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 49-50.)

The District Court found that had Respondent requested that trial counsel file a notice of appeal, she would have done so. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 76

[Magistrate Judge's finding].) Thus, at least as of January 1994, California law would not have required the filing of a notice of appeal in the present case. California law remains the same today. § 1240.1(b).

Accordingly, *Stearns* and *Ortega* have effectively declared California Penal Code § 1240.1(b) unconstitutional. Thus, *Ortega* clearly conflicts with California law on the issue of when defense counsel must file a notice of appeal following a guilty plea. This also calls for a grant of certiorari.

Moreover, California has a rule requiring defendants to exercise personal diligence in ensuring that notices of appeal are filed. *Cf. In re Benoit*, 10 Cal.3d 72, 88-89, 514 P.2d 97, 108, 109 Cal.Rptr. 785, 796 (Cal. 1973). *Ortega* conflicts with this decision, making a grant of certiorari necessary.[16]

For all of the above reasons, a grant of certiorari is needed.

C. There Are Additional Reasons For Reversing *Ortega*

There are additional reasons for reversing *Ortega*: *Lozada* is distinguishable from *Stearns*; further, *Stearns* is distinguishable from the present case and was wrongly decided.

Petitioner submits that *Lozada* is distinguishable from *Stearns* and the present case. *Lozada* was not a guilty plea case. *Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994). In California, a guilty plea

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16. As noted, the superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit, on or about February 20, 1998, at 10-11.) The *Stearns* court found such advice unimportant. *Stearns*, 68 F.3d at 330.

admits all matters essential to the conviction. *People v. DeVaughn*, 18 Cal.3d 889, 895-96, 558 P.2d 872, 875, 135 Cal.Rptr. 786, 789 (Cal. 1977); *see also People v. Turner*, 171 Cal.App.3d 116, 125-26, 214 Cal.Rptr. 572, 577 (Cal.Ct.App. 1985) (guilty plea waives right to raise questions regarding evidence). Indeed, California generally requires a certificate of probable cause for an appeal from a judgment following a guilty plea. § 1237.5; Cal. Rules of Court, Rule 31(d).

Further, Petitioner submits that *Stearns* (upon which *Ortega* relies) is distinguishable and was wrongly decided. *Stearns* is distinguishable because it involved a habeas action by a federal prisoner and did not involve California law as does this case. *Stearns*, 68 F.3d at 329. The present case involves an appeal from a state court judgment under state procedural rules specifically limiting trial counsel's duties with respect to filing a notice of appeal (e.g., § 1240.1(b)). Whatever merit the *Stearns* rule has in the federal context, it should not be extended to state court proceedings. In light of § 1240.1(b), it is difficult to understand how counsel could have had a duty to file a notice of appeal, let alone a duty to file one just because Respondent did not consent to the abandonment of his appeal.

Moreover, *Stearns* involved a complex sentencing scheme which precluded trial counsel from assuming that the defendant did not want to plead guilty. *Stearns*, 68 F.3d at 330. In the present case, there were no meritorious grounds for appealing Respondent's sentence. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 43-44.) Thus, *Stearns* is distinguishable on this basis as well.

Further, *Stearns* was wrongly decided. As noted, in *Stearns* the Ninth Circuit stated that the issue was whether the defendant consented to the failure to file a notice of appeal, rather than whether counsel ignored an explicit request to file. *Stearns*, 68 F.3d at 330. However,

other circuits have explicitly held otherwise and have required such a request be made. *See, e.g., Castellanos*, 26 F.3d at 719. Petitioner submits that *Castellanos* states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances and regardless of state law to the contrary (e.g., California law).

Finally, if the *Ortega* decision stands, every defendant who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, regardless of the amount of time since the conviction. This would even subject final judgments to challenge via habeas corpus petitions based on claimed lack-of-consent even though California law has never required an attorney to obtain consent before abandoning an appeal following a guilty plea.

For all of the foregoing reasons, this Court should grant certiorari.

CONCLUSION

Thus, *Ortega* conflicts with United States Supreme Court authority, other federal circuit court authority, and state supreme court authority on the issue of whether United States Supreme Court precedent alone determines whether a rule is "dictated by precedent" for *Teague* purposes. Further, there is a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea; *Ortega* also conflicts with California law on this point. Accordingly, this case represents an opportunity for this Court to resolve two important federal issues. For the reasons discussed above, Petitioner respectfully asks that this Court grant certiorari and resolve the important issues of law presented herein.

Dated: March 2, 1999.

Respectfully submitted,

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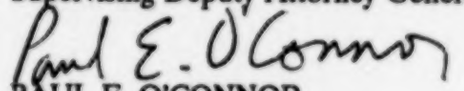

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APPENDIX A

Ortega v. Roe, 160 F.3d 534 (9th Cir. 1998),
filed November 2, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lucio Flores Ortega, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
Ernest C. Roe, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted Oct. 5, 1998.*
San Francisco, California

Filed November 2, 1998

Before: Robert R. Beezer, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Beezer.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

COUNSEL

Ann H. Voris, Assistant Federal Defender, Fresno, California, for the petitioner-appellant.

Paul E. O'Connor, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

BEEZER, Circuit Judge:

Lucio Flores Ortega appeals the denial of his petition for habeas corpus. We address the question whether our opinion in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), expressed a new rule barred from application in the present matter by *Teague v. Lane*, 489 U.S. 288 (1989). We hold that *Stearns* did not express a new rule, rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). We have jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I

A

Petitioner pled guilty to second degree murder in a California Superior Court on October 13, 1993. At the plea hearing, petitioner was represented by a public defender. During the hearing the public defender wrote in her file "bring appeal papers." On March 24, 1994 petitioner attempted to file a notice of appeal which was rejected as untimely.

Petitioner filed a state court petition for a writ of habeas corpus on the ground that trial counsel was ineffective for failing to file a timely notice of appeal. Petitioner subsequently exhausted his state court remedies.

On July 27, 1995, petitioner filed a federal petition for habeas corpus. Respondent answered on November 17, 1995. The matter was referred to a magistrate judge, who held an evidentiary hearing on the limited issue of the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf.

After the hearing, the magistrate judge made the following findings: Petitioner "had little or no understanding" of what an appeal meant or the appeals process. Petitioner had not proved that his counsel had promised to file a notice of appeal. Petitioner did not consent to counsel's failure to file a notice of appeal. The magistrate judge considered whether our opinion in *Stearns* applied to petitioner's claims but ultimately concluded that petitioner was not entitled to relief under *Stearns* on the theory that *Stearns* stated a "new rule" which could not be applied retroactively under *Teague v. Lane*.

The district court adopted the magistrate judge's recommendation that the petition be denied. The court subsequently granted petitioner a certificate of probable cause and this timely appeal followed.

B

We review de novo the denial of a § 2255 motion [sic]. *Stearns*, 68 F.3d at 329. The district court's factual findings are reviewed for clear error. *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1072 (9th Cir. 1998).

To establish ineffective assistance of counsel, a petitioner must prove that: (1) counsel's performance was ineffective and (2) the ineffective performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Stearns*, we held that failure to appeal after a plea agreement is ineffective assistance of counsel without a specific showing of prejudice. *Stearns*, 68 F.3d at 329-30. A petitioner "need only show that he did not consent to the failure to file." *Id.* at 330. The magistrate judge found that petitioner did not consent to the failure to file a notice of appeal. This finding, reviewed for clear error, resolves the application of *Stearns* in petitioner's favor.

II

Resolution of the present matter hinges on whether we expressed in *Stearns* a "new rule" as defined by *Teague*. *Teague* requires a three-step analysis. First, the court must determine the date on which the petitioner's conviction became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Second, it must "[s]urvey[ ] the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, "if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. 518, ----, 117 S.Ct. 1517, 1524-25 (1997).

Those exceptions apply where either (1) "the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the Constitution;" or (2) the rule announces a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 477-78 (internal quotations omitted). Watershed rules are those which are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. The exception is "meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478 (internal quotations omitted).

Steps one and three of the *Teague* analysis are clearly resolved in respondent's favor. *Stearns* postdates

petitioner's case. Petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. *Stearns* was filed on October 12, 1995. Additionally, *Stearns* does not fit under the narrow exceptions to *Teague* reserved for rules that go to the fundamental fairness of the adjudicative process.

The second element of the *Teague* analysis, however, requires reversal. A "new rule," as contemplated by *Teague*, is one which "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or 'was not dictated by precedent existing at the time the defendant's conviction became final.' " *Snook v. Wood*, 89 F.3d 605, 612 (9th Cir. 1996) (quoting *Teague*, 489 U.S. at 301).

Stearns tracks our opinion in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction. In *Lozada*, we held that "'prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was *without the petitioner's consent*.'" *Stearns*, 68 F.3d at 329 (quoting *Lozada*, 964 F.2d at 958) (emphasis in original). In *Stearns*, we reasoned that *Lozada* "would automatically demand reversal in this case, but for one distinction[:] The judgement in this case was entered after a plea rather than after a trial." *Id.* at 330. We conclude that *Stearns* was merely an application of the rule in *Lozada*. Petitioner does not rely on a new rule and his petition is not barred by *Teague*.

III

The district court is instructed to issue a conditional writ releasing Ortega from state custody unless the state trial court vacates and reenters petitioner's judgment of conviction and allows a fresh appeal. We REVERSE and REMAND.

APPENDIX B

Ninth Circuit's Denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed December 11, 1998

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
ERNEST C. ROE, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	ORDER

Before: BEEZER, HALL and RYMER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

The Text of Pertinent Constitutional Provisions, Statutes, and Court Rules:

(1) Sixth Amendment, United States Constitution
(2) California Penal Code § 1237.5
(3) California Penal Code § 1240.1
(4) California Rules of Court, Rule 31(d)
(5) California Rules of Court, Rule 470

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

California Penal Code § 1237.5 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.
>
> This section shall become operative on January 1, 1992.

California Penal Code § 1240.1 provides, in pertinent part:

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document,

paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

California Rules of Court, Rule 31, provides, in pertinent part:

(d) [Guilty or nolo contendere plea] If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after

the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

California Rules of Court, Rule 470, provides:

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the

necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.